

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JESSI C. WEBB and LAURICE WEBB, husband and wife and natural parents of B.W.; and JESSI C. WEBB and LAURICE WEBB, representatives of the ESTATE OF B.W., }
Plaintiffs, }
v. }
CITY OF RICHLAND, a municipal corporation; DOUGLAS L. WOLD, an individual; and PETER L. WOLD and CINDY L. WOLD, husband and wife, }
Defendants. }

BEFORE THE COURT is Defendant Douglas L. Wold's Motion For Summary Judgment (ECF No. 49). The motion was heard with oral argument on June 23, 2011. Todd R. Startzel, Esq., argued for Defendant Douglas L. Wold. Richard E. Lewis, Esq., argued for Plaintiffs.

I. BACKGROUND

On March 17, 2007, twelve year old B.W. visited the Horn Rapids Off-Road Vehicle (ORV) Park in Richland, Washington, a facility owned and operated by

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1 the City of Richland. B.W. rode his motorcycle on the park's motocross course.
 2 The course included a flat, elevated plateau (the "table top"), followed by a double
 3 jump. The double jump concealed fallen riders from other riders using the course.
 4 After riding over the first jump of the double jump, B.W. crowned the peak of the
 5 second jump and fell on his landing. As B.W. was getting up from the ground, 19
 6 year old Douglas L. Wold rode his motorcycle over the double jump, landed just
 7 behind B.W. and struck him. B.W. died from the injuries he suffered.

8 The parents of B.W., and his estate, have asserted wrongful death claims
 9 against Defendant Wold. Wold now seeks summary judgment on those claims,
 10 contending that as a coparticipant in the same sport as B.W., he owed no duty of
 11 care to B.W. on account of the implied primary assumption of the risk doctrine.

12 **II. DISCUSSION**

13 **A. Summary Judgment Standard**

14 The purpose of summary judgment is to avoid unnecessary trials when there
 15 is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d
 16 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469 (1975). Under Fed. R.
 17 Civ. P. 56, a party is entitled to summary judgment where the documentary
 18 evidence produced by the parties permits only one conclusion. *Anderson v.*
 19 *Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505 (1986); *Semegen v.*
 20 *Weidner*, 780 F.2d 727, 732 (9th Cir. 1985). Summary judgment is precluded if
 21 there exists a genuine dispute over a fact that might affect the outcome of the suit
 22 under the governing law. *Anderson*, 477 U.S. at 248.

23 The moving party has the initial burden to prove that no genuine issue of
 24 material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475
 25 U.S. 574, 586, 106 S.Ct. 1348 (1986). Once the moving party has carried its
 26 burden under Rule 56, "its opponent must do more than simply show that there is
 27 some metaphysical doubt as to the material facts." *Id.* The party opposing

1 summary judgment must go beyond the pleadings to designate specific facts
 2 establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325,
 3 106 S.Ct. 2548 (1986).

4 In ruling on a motion for summary judgment, all inferences drawn from the
 5 underlying facts must be viewed in the light most favorable to the nonmovant.
 6 *Matsushita*, 475 U.S. at 587. Nonetheless, summary judgment is required against
 7 a party who fails to make a showing sufficient to establish an essential element of
 8 a claim, even if there are genuine factual disputes regarding other elements of the
 9 claim. *Celotex*, 477 U.S. at 322-23.

10

11 **B. Implied Primary Assumption Of The Risk: Coparticipants**

12 Four varieties of assumption of risk operate in Washington: (1) express; (2)
 13 implied primary; (3) implied unreasonable; and (4) implied reasonable assumption
 14 of risk. The first two types, express and implied primary assumption of risk, arise
 15 when a plaintiff has consented to relieve the defendant of a duty- owed by the
 16 defendant to the plaintiff- regarding specific known risks. *Gregoire v. City of Oak*
 17 *Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). Implied primary assumption
 18 of risk is a complete bar to recovery for the risk assumed. *Id.*

19 Assumption of the risk in the sports participant context “is in reality the
 20 principle of no duty- hence no breach and no underlying cause of action.” *Brown*
 21 *v. Stevens Pass, Inc.*, 97 Wn.App. 519, 523, 984 P.2d 448 (1999), quoting *Codd v.*
 22 *Stevens Pass, Inc.*, 45 Wn.App. 393, 402, 725 P.2d 1008 (1986). “A defendant
 23 simply does not have a duty to protect a sports participant from dangers which are
 24 an inherent and normal part of a sport.” *Id.*, quoting *Scott v. Pacific W. Mountain*
 25 *Resort*, 119 Wn.2d 484, 498, 834 P.2d 6 (1999). *Brown*, *Codd*, and *Scott* all
 26 involved application of the implied primary assumption of the risk doctrine to
 27 claims against a landowner/facility operator. In that specific context, “assumption
 28 of risk does not preclude a recovery for **negligent** acts which unduly enhance such

1 risks.” *Brown*, 97 Wn.App. at 451, quoting *Scott*, 119 Wn.2d at 501. (Emphasis
 2 added). Washington has not addressed the duty of a coparticipant to another
 3 coparticipant under the implied primary assumption of the risk doctrine. Other
 4 jurisdictions, however, have done so, notably California.

5 In a very recent decision, *Rosencrans v. Dover Images, Ltd.*, 192
 6 Cal.App.4th 1072, 122 Cal.Rptr.3d 22 (2011), the California Court of Appeals
 7 (Fourth District, Division 2) discussed the particular status of a defendant and how
 8 that impacts the implied primary assumption of the risk analysis. *Rosencrans*
 9 involves very similar facts to the case at bar, although the individual who was
 10 injured in that case was 38 years old. This individual was riding his motorcycle on
 11 a motocross track. He went “up a ramp for a jump and fell, landing on the
 12 downslope of the ramp, which placed him outside the view of the other riders.”
 13 After he stood up and picked up his motorcycle, he was struck in rapid succession
 14 by two other motorcyclists who took the same jump and landed on the downslope.
 15 Plaintiffs (the motorcycle rider and his wife) brought suit against the motocross
 16 track operator.

17 The *Rosencrans* court noted that an owner/operator of a sports facility has a
 18 duty to provide a reasonably safe course or track and this duty requires the owner
 19 or operator to minimize the risks without altering the nature of the sport. 122 Cal.
 20 Rptr. 3d at 32. Thus:

21 In the sport of motocross, an owner/operator of a track has
 22 a duty to minimize the risk of a coparticipant crashing into
 23 a second coparticipant who has fallen on the track. Providing
 24 a warning system of some sort, such as caution flaggers to
 25 alert riders of a fallen participant, would assist in minimizing
 26 the risk of riders colliding with one another. If a rider
 27 received adequate warning of a fallen rider on the track, then
 28 the rider could change his or her course to avoid the fallen
 rider. Further, providing a warning system, such as caution
 flaggers, would not alter the sport, because it would not
 prevent riders from jumping and traveling at high speeds,
 rather it would provide riders with information so that they
 could alter their course as necessary. In sum, we conclude
 that the owner/operator of a motocross track has a duty to
 provide a warning system, such as caution flaggers, to alert

1 other riders of a fallen participant on the track.

2 *Id.* at 32-33.

3 Washington courts agree the duty of an owner/operator is to minimize the
 4 risks without altering the nature of the sport. A participant assumes the risks
 5 which are inherent in the nature of the sport and it is the duty of the
 6 owner/operator to not increase the risks to a participant over and above those
 7 inherent in the sport. *Scott*, 119 Wn.2d at 501-02. “[P]rimary assumption of the
 8 risk in a sports setting does not include the failure of the operator to provide
 9 reasonably safe facilities.” *Id.* at 502. The undersigned believes Washington
 10 courts would also agree with California courts that the duty of coparticipants to
 11 each other in a sport is to not intentionally injure the other, or engage in conduct
 12 that is so reckless as to be totally outside the range of ordinary activity involved in
 13 the sport.

14 In *Rosencrans*, the defendant owner/operator argued the duty analysis
 15 should follow the duty analysis in *Distefano v. Forester*, 85 Cal.App.4th 1249, 102
 16 Cal.Rptr.2d 813 (2001). The court rejected that argument, noting that *Distefano*
 17 concerned the duty owed by one participant to another participant: “The identity of
 18 the defendant is not meaningless - the duty owed by a coparticipant is not
 19 necessarily the same duty owed by the owner of the track.” *Rosencrans*, 122
 20 Cal.Rptr. at 34. In *Distefano*, the plaintiff and the defendant were engaged in the
 21 sport of “off-roading.” The plaintiff rode his motorcycle on a narrow, one-lane
 22 dirt trail approaching the crest of a blind hill, while the defendant coparticipant, in
 23 a dune buggy, was ascending the opposite side of the same blind hill. The plaintiff
 24 and the defendant could not see one another as they approached the top of the hill
 25 and ultimately they collided. The defendant moved for summary judgment and it
 26 was granted by the trial court. On appeal, the plaintiff argued the defendant
 27 increased the risk inherent in the sport of off-roading, in part, by failing to have
 28 another person act as a spotter on top of the blind hill to warn off-roading vehicles

1 traveling up the same blind hill in the opposite direction. The appellate court
 2 (Fourth District, Division 1) held as a matter of law that defendant did not owe a
 3 duty to the plaintiff to use a spotter. *Id.* at 1265-66. The appellate court
 4 summarized its holding as follows:

5 [W]e hold that the sport of off-roading involves inherent risks
 6 that the participants in this recreational activity may be involved
 7 in inadvertent motor vehicle collisions and may suffer serious
 8 injury or death. These inherent risks include the risk that
 9 coparticipants ascending a blind hill in motor vehicles from
 10 opposite directions might not be able to see one another in
 11 time to avoid a collision. We also hold that a participant in the
 sport of off-roading owes a duty to other participants not to
 injure them intentionally or to engage in conduct that is so
 reckless as to be totally outside the range of ordinary activity
 involved in the sport, and a person who is injured while
 participating in such activity may not sue a coparticipant
 for negligence.

12 *Id.* at 1254.

13 A participant who is injured in a sporting activity may not sue another
 14 participant for mere negligence. *Id.* at 1264, citing *Knight v. Jewett*, 3 Cal.4th
 15 296, 320, 11 Cal.Rptr.2d 2, 834 P.2d 696 (1992).¹ *Knight* “stands for the
 16 proposition that a participant who is injured in a sporting activity by a
 17 coparticipant may sue that coparticipant only for intentional infliction of injury or
 18 tortious behavior ‘so reckless as to be totally outside the range of the ordinary
 19 activity involved in the sport.’” *Id.* at 1261, quoting *Knight*, 3 Cal.4th at 320-21.
 20 “[C]onduct is totally outside the range of ordinary activity involved in the sport
 21 (and thus any risks resulting from that conduct are not inherent to the sport) if the
 22 prohibition of that conduct would neither deter vigorous participation in the sport
 23 nor otherwise fundamentally alter the nature of the sport.” *Id.*, quoting *Freeman v.*
 24 *Hale*, 30 Cal.App.4th 1388, 1394, 1396, 36 Cal Rptr.2d 418 (1994).² Put another

25
 26 ¹ *Knight* is a decision of the California Supreme Court.
 27
 28 ² *Freeman* is a decision of the California Court of Appeals, Fourth District,

1 way, conduct is within the range of ordinary activity involved in the sport and
 2 therefore, not reckless, if the prohibition of that conduct would deter vigorous
 3 participation in the sport or otherwise fundamentally alter the nature of the sport.
 4 The risks resulting from this type of conduct are inherent to the sport.

5 Plaintiffs were recently allowed to amend their complaint. The complaint is
 6 to be modified to include allegations that Wold operated his motorcycle in a
 7 “reckless” manner. (Amended Complaint, Ex. 1 to ECF No. 86 at Paragraphs 6.1
 8 to 6.6).³ Plaintiffs have not, however, raised a genuine issue of material fact that
 9 Wold was reckless in any manner, more specifically that he acted outside the range
 10 of normal activity involved in motocross.

11 Plaintiffs assert as follows:

12 B.W., a 12-year-old boy, did not appreciate the danger of
 13 sharing the motocross track with riders of Mr. Wold’s size
 14 and much larger motorcycles. Mr. Wold should have known
 15 that Horn Rapids’ failure to segregate riders by age required
 16 extra caution on his part. Mr. Wold also noticed there were
 17 no flaggers which alerted him to a lack of necessary safety
 18 precautions. Instead, of riding more slowly, Mr. Wold took
 19 a blind jump at full throttle. These facts raise material issues
 20 that preclude summary judgment for Mr. Wold.

21 Taking blind jumps at high speed is an inherent part of motocross. It is within the
 22 range of normal activity undertaken in order to successfully land jumps on a
 23 motocross course. As the *Rosencrans* court put it:

24 Motocross is a sport in which people ride motorcycles
 25 and perform jumps off of ramps, while in a setting filled
 26 with dust and other people on motorcycles. Given the racetrack
 27 setting, speed involved, and jumping maneuvers, it follows
 28 that coparticipants will fall down, and while down, be struck by
 other riders whose views are obscured by the blind
 corners, blind ramps, dust, and/or other riders.

24
 25 Division 2.

26 ³ In an order May 25, 2011 (ECF No. 99), the court granted the Motion To
 27 Amend Complaint, but Plaintiffs have yet to file their Amended Complaint.
 28

1 122 Cal.Rptr.3d at 32.

2 Failure of the Horn Rapids ORV Park to segregate riders by age and to
 3 provide flaggers did not create a duty on the part of Defendant Wold to take jumps
 4 more slowly or to avoid blind jumps altogether. Requiring riders to take jumps
 5 more slowly or to avoid blind jumps altogether would deter vigorous participation
 6 in motocross or otherwise fundamentally alter the nature of motocross. It was
 7 not Wold's duty to segregate the riders and/or provide flaggers. It was not Wold's
 8 duty to determine if it was safe for other riders to participate.

9 In Washington, express and implied primary assumption of the risk
 10 normally require a showing that the plaintiff had full subjective understanding of
 11 the presence and nature of the specific risk, and voluntarily chose to encounter that
 12 risk. *Gregoire v. City of Oak Harbor*, 170 Wn.2d at 636. As noted, however,
 13 Washington courts have not dealt with the issue of a coparticipant's duty of care to
 14 another coparticipant when they are engaged in a sporting activity together. All of
 15 the Washington cases regarding implied primary assumption of risk and sporting
 16 activity have addressed owner/operator liability.

17 In California, where there have been cases dealing with implied primary
 18 assumption of risk in the coparticipant liability context, there is guidance. In
 19 *Whelihan v. Espinoza*, 110 Cal.App.4th 1566, 2 Cal.Rptr.3d 883 (2003), the
 20 plaintiff was injured in a jet skiing accident. Her jet ski collided with the
 21 defendant's jet ski when plaintiff made a left turn in front of the defendant who
 22 was also on a jet ski. The accident happened two days after plaintiff and
 23 defendant had purchased jet skis. The trial court granted summary judgment in
 24 favor of the defendant based on the doctrine of primary assumption of risk and the
 25 appeals court affirmed, concluding the defendant owed no duty of ordinary care to
 26 plaintiff as they engaged in the sport of jet skiing together. The plaintiff suggested
 27 that because she was a novice jet skier, having a total of only six hours of actual
 28 operating time, a triable issue of material fact existed as to whether the doctrine of

1 primary assumption of risk applied. The appeals court (Third District) disagreed:

2 In determining the doctrine's applicability, we disregard
 3 "whether plaintiff subjectively knew of, and voluntarily
 4 chose to encounter the risk of defendant's conduct"; [i]nstead,
 5 our resolution of this issue turns on whether, in light of the
 6 nature of the sporting activity in which defendant and
 7 plaintiff were engaged, defendant's conduct breached
 8 a legal duty of care to plaintiff."

9 *Id.* at 888, quoting *Knight*, 3 Cal.4th at 315. The appeals court noted:

10 The common law legal principle of primary assumption
 11 of risk [Citation omitted] is founded upon a public policy
 12 judgment that imposing tort liability on a sports participant
 13 for his or her ordinary negligence is not appropriate because
 14 it would chill vigorous participation in the sport and, as a
 15 result, would have a "deleterious effect on the nature of the
 16 sport . . . as a whole." [Citation omitted]. For example, tort
 17 liability would have an "undesirable chilling effect" on
 18 vigorous, athletic activity, and "might well deter friends
 19 from voluntarily assisting one another in . . . potentially
 20 risky sports." [Citation omitted].

21 *Id.* at 889.

22 In *Peart v. Ferro*, 119 Cal.App.4th 60, 13 Cal.Rptr.3d 885 (2004), the First
 23 District California Court of Appeals (Division 3) had occasion to deal with a
 24 collision between Sea-Doos. One of the Sea-Doos was operated by a 13 year old
 25 novice operating a Sea-Doo for the first time while an adult (Ferro) sat behind him
 26 to supervise. The other Sea-Doo was operated by a 16 year old (Peart). The court
 27 held Peart's negligence action was barred by the doctrine of primary assumption
 28 of risk. Peart argued his case was distinguishable from the *Whelihan* case because
 unlike *Whelihan*, two minors were involved. The court concluded that "to the
 extent they exist, the factual distinctions . . . do not affect the applicability of the
 doctrine of primary assumption of risk in this case," noting that the ages of the
 parties in *Whelihan* were never mentioned and that other California cases
 "involving comparably youth-oriented sports have either failed to mention the age
 of the participants at all [citations omitted], or essentially treated the ages of the
 coparticipants as irrelevant." 119 Cal.App.4th at 75. The court noted that the fact
 Ferro (the adult defendant) was riding on the same Sea-Doo as Jason (13 year old

1 minor) in order to supervise his operation of the watercraft did not affect
2 application of the assumption of the risk doctrine because the evidence showed
3 that despite his supervisory role, Ferro was also a coparticipant in the activity with
4 Peart and Jason. *Id.* at 76.

5 The undersigned believes Washington courts would follow California's lead
6 insofar as application of the primary assumption of risk doctrine in the
7 coparticipant liability context and therefore, B.W.'s age, his subjective
8 understanding of the risks of motocross, and whether he voluntarily chose to
9 encounter those risks, are irrelevant. Even were they relevant, however, the court
10 would find there is no genuine issue of material fact, based on the evidence
11 presented by Defendant Wold, that B.W. had full subjective understanding of the
12 presence and nature of the specific risk, that being inadvertent collisions with
13 other riders, and voluntarily chose to encounter that risk. This evidence includes
14 the following: B.W. rode motorcycles since he was 6 or 7; he watched the sport
15 on television; he read magazines about motocross which discussed crashes and
16 injuries; B.W. and his cousin watched You Tube videos and DVDs of motocross
17 racing which showed crashes and injuries; B.W. and his cousin talked about
18 crashes and the potential for getting hurt; B.W. had wrecked on prior occasions
19 and had seen other riders, such as his cousin, wreck).

20 Defendant Wold did not create a risk over and above those inherent in the
21 sport of motocross. He took the double jump just as he was supposed to and just
22 as everyone else did, well within the bounds of normal motocross conduct. He
23 clearly did not intentionally strike B.W. with his motorcycle. Nor did he act
24 recklessly. Inadvertent collisions with other riders, perhaps the result of
25 negligence at most, are an inherent risk of motocross.

26 III. CONCLUSION

27 Defendant Douglas L. Wold's Motion For Summary Judgment (ECF No.
28

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1 49) is **GRANTED**. Pursuant to the implied primary assumption of risk doctrine,
2 Wold did not owe a duty of care to B.W. and no recovery can be had against
3 Wold. Wold is awarded judgment on all claims asserted against him by Plaintiffs.

4 **IT IS SO ORDERED.** The District Executive is directed to enter this order
5 and forward copies of the same to counsel of record.

6 **DATED** this 5th of July, 2011.

7 *s/Lonny R. Sukko*

8

9 LONNY R. SUKO
United States District Judge